

**SHANNON TAITANO, ESQ.**  
**OFFICE OF THE GOVERNOR OF GUAM**  
Ricardo J. Bordallo Governor's Complex  
Adelup, Guam 96910  
Telephone: (671) 472-8931  
Facsimile: (671) 477-6666

EDUARDO A. CALVO, ESQ.  
KATHLEEN V. FISHER, ESQ.  
RODNEY J. JACOB, ESQ.  
DANIEL M. BENJAMIN, ESQ.  
CALVO & CLARK, LLP

Attorneys at Law  
655 South Marine Corps Drive, Suite 202  
Tamuning, Guam 96913  
Telephone: (671) 646-9355  
Facsimile: (671) 646-9403

*Attorneys for the Government of Guam  
and Felix P. Camacho, Governor of Guam*

**FILED**

**DISTRICT COURT OF GUAM**

JUN 22 2007

**MARY L.M. MORAN  
CLERK OF COURT**

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF GUAM

JULIE BABAUTA SANTOS, et. al.,

Petitioners.

CIVIL CASE NO. 04-00006  
(Consolidated with Civil Case Nos.  
04-00038 and 04-00049)

# THE GOVERNOR AND GOVERNMENT OF GUAM'S POSITION REGARDING APPLICATIONS FOR ATTORNEYS' FEES

FELIX P. CAMACHO, etc., et. al.

### Respondents.

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1 Governor of Guam Felix P. Camacho and the Government of Guam hereby respectfully  
2 submit their positions regarding: (1) the June 6, 2006 "Amended Motion for Attorneys' Fees and  
3 Costs Pursuant to Section II(a)(iv) of the May 26, 2006 Class Action Settlement Agreement" filed  
4 by plaintiffs' counsel in *Santos* and *Torres* (Docket 331); and (2) the June 8, 2007 "Motion for  
5 Attorney Fees, Motion for Bill of Costs" filed by plaintiffs' counsel in *Simpao* (Docket 414).

6 **INTRODUCTION**

7 In a class action, the role of the attorneys who represent the plaintiffs and the class is  
8 reversed when it comes to the issue of attorneys' fees and costs. Until now, these lawyers have  
9 served as advocates for their respective plaintiffs and the class of persons they represent and have  
10 sought to expand the recovery by the class. Now they appear before the Court seeking to  
11 diminish that recovery to the class by receiving a portion of the gross recovery. Thus, class  
12 counsel and counsel for the *Santos* and *Torres* plaintiffs seek to jointly recover a total of 10% of  
13 the proceeds, or up to \$9 million. Counsel for the *Simpao* plaintiffs, who have not even supported  
14 the settlement of this case, seek another 5% or \$4.5 million, either to be taken from the 10%  
15 sought by the *Santos* and *Torres* plaintiffs, or as an additional deduction from the net recovery of  
16 the EIC Class.

17 The ultimate determination of whether attorneys' fees and costs should be awarded and  
18 the amount of such award rests within the discretion of this Court, which serves as the protector  
19 of the interests of the class. The class in this case is one in particular need of judicial protection.  
20 It consists of the recipients of the EIC. These are hard working persons, many with dependents,  
21 who are making salaries at the lower end of the income scale. They are frequently referred to as  
22 the "working poor." This is not some "lottery" settlement recovery to them; the \$90 million the  
23 Government has agreed to pay to these tens of thousands of persons on Guam is money they need  
24 for the necessities of their day-to-day lives. Thus, it is the view of the Governor and the  
25 Government that *any* diminishment of this \$90 million must be taken with utmost care, and that  
26 the current requests to take \$9 million to \$13.5 million of this and give it to three law firms is  
27 unconscionable.

1        Rather, the Governor and Government ask that the Court exercise its authority to ensure  
2        that any award of attorneys' fees and cost in this case is reasonable and tied to the actual work  
3        performed and the results achieved. In that regard, they ask that the Court require the attorneys in  
4        these actions to state and justify the hours worked on this case, and the benefit received by the  
5        EIC Class. At present, the Court has been given no calculation of hours or expenses by plaintiffs;  
6        counsel (although they have stated their willingness to submit such bills). Until such bills are  
7        provided, there is no way to ensure that the millions in fees sought is a "reasonable" amount, as  
8        required by Ninth Circuit precedent.

9        This is a case where, for policy reasons based upon the Governor's commitment since he  
10      was in the Guam Legislature, the defendants were willing to settle at an early stage, causing  
11      proportionally low expenditures of time and money by the plaintiffs' lawyers compared to other  
12      large cases. In the three cases, there were but two motions to dismiss, one partial summary  
13      judgment motion that accomplished nothing more than had been already agreed to in a previous  
14      settlement, and several settlement negotiations with some attendant litigation. That is it. No  
15      depositions occurred, no large summary judgment motions were filed, discovery was non-  
16      existent, no pre-trial preparations occurred, and there were no trials.

17      Under these circumstances, the Governor and Government believe it would be proper that  
18      a lodestar be applied, or that at least a lodestar figure be calculated and compared to any  
19      percentage recovery, so as to ensure that the recovery of any fees or costs is reasonable. They ask  
20      that the Court, in its role as guardian for the unrepresented EIC Class members, exercise its  
21      oversight abilities to ensure that the ultimate award of fees and costs is not an arbitrary  
22      percentage, but rather a careful calculation that ensures fairness to the EIC Class. Finally, they  
23      also ask that the Court carefully consider whether the *Simpao* plaintiffs' attorneys application has  
24      any merit at all, given that most of their claims of "contributions" to the resolution of this case are  
25      dubious at best, and that they most particularly have not promoted the \$90 million settlement  
26      from which they now seek to recover at the expense of the EIC Class.

## **ARGUMENT**

2 Ninth Circuit precedent establishes that this Court has a clear mandate to act as the  
3 protector of the interests of the EIC Class in evaluating the pending attorneys' fees and costs  
4 motions: "In a common fund case, the judge must look out for the interests of the beneficiaries,  
5 to make sure that they obtain sufficient financial benefit after the lawyers are paid. Their interests  
6 are not represented in the fee award proceedings by the lawyers seeking fees from the common  
7 fund." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 109 F.3d  
8 602, 608 (9th Cir. 1997) (emphasis added) (citing *Wash. Public Power Supply System Securities*  
9 *Litig.*, 19 F.3d 1291, 1300-01 (9th Cir. 1994)). As one court has stated: "The interest of class  
10 counsel in obtaining fees is adverse to the interest of the class in obtaining recovery because the  
11 fees come out of the common fund set up for the benefit of the class. In addition, there is often no  
12 one to argue for the interests of the class (that their recovery should not be unfairly reduced),  
13 since it is to be expected that class members with small individual stakes in the outcome will not  
14 file objections, and the defendant who contributed to the fund will usually have scant interest in  
15 how the fund is divided between the plaintiffs and class counsel." *In re DPL Inc. Securities*  
16 *Litigation*, 307 F. Supp. 2d 947, 951 (S.D. Ohio 2004).

17 I. Under Ninth Circuit Precedent, the Court Has the Discretion to Apply the Lodestar  
18 or Percentage-of-the-Fund Methods Should It Determine to Award Fees, but Must  
Ensure that Any Fee Award Is Reasonable

19        If this Court determines it will award fees and costs as to this class action litigation, it has  
20      the discretion to base that award either on the “lodestar” or “percentage-of-the-fund” basis.  
21      *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (“Under Ninth Circuit law, the  
22      district court has discretion in common fund cases to choose either the percentage-of-the-fund or  
23      the lodestar method.”); *Fischel v. Equitable Life Assur. Society*, 307 F.3d 997, 1006 (9th Cir.  
24      2002) (same). The Ninth Circuit has “made it clear that ‘no presumption in favor of either the  
25      percentage or the lodestar method encumbers the district court’s discretion to choose one or the  
26      other.’” *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1123 (9th Cir. 2002) (quoting *In re  
27      Wash. Public Power*, 19 F.3d at 1296).

1           Under the percentage method, the court awards the attorneys a percentage of the fund  
2 sufficient to provide plaintiffs' attorneys with a reasonable fee. *Paul, Johnson, Alston & Hunt v.*  
3 *Graulty*, 886 F.2d 268, 272 (9th Cir.1989). Under the lodestar method, the court should  
4 "multipl[y] the number of hours reasonably spent in achieving the results obtained by a  
5 reasonable hourly rate." *Winingar*, 301 F.3d at 1125 (quoting *Friend v. Kolodzieczak*, 72 F.3d  
6 1386, 1389 (9th Cir.1995) (emphasis altered from original)). The court may then enhance the  
7 lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Van Gerwen v. Guarantee*  
8 *Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir. 2000).<sup>1</sup>

9           Whichever method is applied, "[b]ecause a reasonable fee award is the hallmark of  
10 common fund cases, and because arbitrary, and thus unreasonable, fee awards are to be  
11 avoided, neither method should be applied in a formulaic or mechanical fashion." *In re*  
12 *Washington Public Power*, 19 F.3d at 1295 n.2.; *Florida v. Dunne*, 915 F.2d 542, 545 (9th Cir.  
13 1990)). "Reasonableness is the goal, and mechanical or formulaic application of either method,  
14 where it yields an unreasonable result, can be an abuse of discretion." *Fischel*, 307 F.3d at 1007.  
15 Indeed, the requirement that fees be reasonable is mirrored in Guam's Rules of Professional  
16 Conduct, which state that "[a] lawyer's fee shall be reasonable." Guam R. Prof. Cond. 1.5.

17 **II. The Facts of this Case Support the Court's Exercise of the Lodestar Method in  
18 Calculating Attorney Fees under Ninth Circuit Precedent**

19           The circumstances in this case make a lodestar award much more reasonable. Directly on  
20 point is the Ninth Circuit's decision in *Fischel v. Equitable Life Assur. Society*, 307 F.3d 997 (9th

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22           <sup>1</sup> Following Supreme Court precedent, the Ninth Circuit has recognized eleven factors that  
23 "are relevant to the determination of the amount of attorney's fees: (1) the time and labor  
24 required; (2) the novelty and difficulty of the issues; (3) the skill requisite to perform the legal  
25 service properly; (4) the preclusion of employment by the attorney due to acceptance of the case;  
26 (5) the customary fee; (6) time limitations imposed by the client or the circumstances; (7) the  
27 amount involved and the results obtained; (8) the experience, reputation and ability of the  
28 attorneys; (9) the 'undesirability' of the case; (10) the nature and length of the professional  
relationship with the client; and (11) awards in similar cases." *Van Gerwen*, 214 F.3d at 1045 n.2  
(citation omitted). The contingent nature of a case should *not* be considered. *Id.* (citation  
omitted). Further, "the Supreme Court has held that novelty or complexity of the issues should  
not be considered at the multiplier stage, and that quality of representation and results obtained  
are ordinarily subsumed in the lodestar determination and in most cases should not be considered  
in the multiplier step." *Id.* (citing *Blum v. Stenson*, 465 U.S. 886, 898-901 (1984)).

1 Cir. 2002). In that case, as here, there was an “early settlement,” with “no discovery, no lengthy  
2 settlement negotiations, no protracted litigation of any kind.” *Id.* at 1003. After entry of  
3 judgment, just as in this case, “Plaintiffs’ counsel applied for an award of attorney’s fees and  
4 costs, requesting 10 percent, or \$1,847,500, of the settlement fund.” *Id.* at 1004.

5 But the District Court denied this request for 10% of the fund (having already once before  
6 denied a request for 25%). *Fischel*, 307 F.3d at 1004. Instead, “the court reaffirmed its  
7 determination of a ‘generous’ combined hourly rate [for staff and counsel] of \$300.” *Id.* “After  
8 noting that the use of a multiplier is the exception rather than the rule, the district court awarded a  
9 1.5 multiplier for counsel’s 100 percent success rate.” *Id.* After applying the multiplier, the court  
10 awarded \$686,226.25, or approximately 3% of the settlement fund. *Id.* The attorneys appealed.

11 The Ninth Circuit held that the district court had acted properly on the facts of the case in  
12 awarding fees and costs using the lodestar in an amount that ultimately equaled 3% of the fund.  
13 *Fischel*, 307 F.3d at 1007. As it explained, “[t]he fact that the case was settled early in the  
14 litigation support[ed] the district court’s ruling....” Indeed, as the Ninth Circuit stated, to apply a  
15 percentage-of-the-fund recovery in such a case “**might very well have been a ‘windfall.’**” *Id.*  
16 (emphasis added). “[D]espite Plaintiffs’ counsel’s assertion that they should have been  
17 compensated for the size of the fund they obtained, the district court compensated counsel for this  
18 achievement when the district court applied a 1.5 multiplier for their 100 percent success rate. *Id.*

19 Nor was the Ninth Circuit convinced that a 10% fee award was merited simply because  
20 there was no objection. “[W]e are not persuaded that the district court abused its discretion by  
21 failing to award 10 percent of the fund when no class member objected to that percentage.”  
22 *Fischel*, 307 F.3d at 1007. As the court explained, “this factor is not outcome determinative; it  
23 must be considered in light of all of the other factors. Here, the district court did not abuse its  
24 discretion by failing to increase the attorney’s fee award to account for the class members’ view  
25 of the requested fee award because (1) there was an early settlement, (2) the district court used the  
26 lodestar rather than the percentage-of-the-fund approach to calculate fees, and (3) the district  
27 court applied a 1.5 multiplier for counsel’s 100 percent success rate.” *Id.* at 1008.

1 Application of the lodestar in this case makes sense for the same reason it did in *Fischel* –  
2 litigation was minimal, with an early settlement that obviated the need for any extensive  
3 expenditures. Thus, an examination of the docket and record in the *Santos*, *Torres*, and *Simpao*  
4 cases reveals the following record:

- 5 • No depositions were conducted;
- 6 • No written discovery was conducted;<sup>2</sup>
- 7 • No pre-trial proceedings were held;
- 8 • No trial proceedings were conducted.

9 Instead, the litigation of the three cases has consisted largely of the following that might  
10 be considered to have some way benefited the EIC Class:

- 11 • The filing of complaints;
- 12 • Limited litigation regarding the first *Santos* settlement (resolved without a  
13 hearing or judicial determination by the subsequent *Santos* and *Torres* settlements);
- 14 • Opposition to one motion to dismiss each in *Torres* and *Simpao*;
- 15 • The participation of *Santos* counsel in three mediations occupying around  
16 five or six days total, and *Torres* and *Simpao* counsel in one mediation lasting a couple  
days;
- 17 • Participation in drafting of settlement agreements by *Santos* and later  
18 *Torres* counsel;
- 19 • The filings to obtain approval of the three settlements and class  
certification by *Santos*, and later *Torres*, counsel.

20 Indeed, looking at the docket in these cases, it is plain that much of the litigation that did occur  
21 concerned the Governor and Attorney General's dispute as to who represented the Government of  
22 Guam, an issue that did not require the involvement of the plaintiffs' counsel.<sup>3</sup>

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24 <sup>2</sup> The *Simpao* plaintiffs sought to serve certain discovery, but only after *Santos* settled.  
25 They never obtained responses because it was improper, and therefore cannot claim to have  
benefited the class thereby.

26 <sup>3</sup> The *Simpao* plaintiffs' counsel did attempt to intervene in that portion of the litigation.  
27 But (1) it is unclear how this ever could have been of benefit to the class; and (2) *Simpao*  
28 plaintiffs' counsel sided with the Attorney General, who ultimately lost this dispute, and so  
*Simpao* plaintiffs' counsel did not even prevail on this issue, assuring that these efforts were  
without benefit to the class. See *infra* Part V (objectors must show efforts benefited the class).

1           Thus, the record bears out what the Court already knows: There was an early settlement  
2 of this case, which, while it may be of substantial benefit of the EIC Class, makes any effort to  
3 obtain a \$9 million (much less \$13.5 million) recovery wholly unreasonable because it is not  
4 reasonably tied to the effort expended. *In re Wash. Pub. Power*, 19 F.3d at 1295 n.2. (award of  
5 attorneys' fees may not be unreasonable); *accord Florida v. Dunne*, 915 F.2d at 545. Under such  
6 circumstances, the efforts by Plaintiffs' counsel to obtain a 10%-15% award consists of nothing  
7 less than an attempt to obtain an unwarranted windfall. *See Fischel*, 307 F.3d at 1007.

8           Indeed, here the size of the recovery has little to do with the efforts of plaintiffs' counsel,  
9 which have required no special effort as to individual claims, and much more to do with the fact  
10 that tens of thousands of claims have been aggregated together and processed by DRT and the  
11 Government (which have assumed the duty of individually administering the claims under the  
12 Settlement Agreement). Where the size of a recovery "is due to the fact that it resolves not just  
13 one claim, but large numbers of identical claims, and the services of the attorney are essentially  
14 the same as would have been required if there had been only one claim, it makes no sense to gear  
15 the fee award to the total dollar amount of the [recovery]." *Lealao v. Beneficial Cal., Inc.*, 82 Cal.  
16 App. 4th 19, 49 n.16 (2000) (quoting *Reasonable Fees: A Suggested Value-Based Analysis for*  
17 *Judges*, 184 F.R.D. 131, 141-42 (1999)).

18           Of course, plaintiffs' counsel have argued that their 10-15% request is reasonable because  
19 there is a "benchmark" of 25% that makes their request for millions of dollars look reasonable.  
20 But, the Ninth Circuit has actually rejected even much lower figures, such as 6%, where  
21 unreasonable on the facts of this case, and instead ordered that on remand the district court apply  
22 the lodestar method. *See Winingar*, 301 F.3d 1115, 1125 n.9 (9th Cir. 2002) (Prior precedent  
23 "does not set a floor under which a district court cannot award attorneys' fees in common fund  
24 cases, . . . , nor does it require utilization of the percentage of the fund method. .... In any event,  
25 our conclusion that the 6% fee award was unreasonable under the circumstances necessarily  
26 indicates that Plaintiffs' counsels' request for a 25% fee award must be rejected."") (emphasis  
27 added) (quoting *In re Wash. Public Power*, 19 F.3d at 1296; *Vizcaino*, 290 F.3d at 1047, 1052-  
28 55); *see also In re Coordinated Pretrial Proceedings*, 109 F.3d at 607 ("Reasonableness is the

1 goal, and mechanical or formulaic application of either method, where it yields an unreasonable  
2 result, can be an abuse of discretion. [citation omitted]. A 25% benchmark might be reasonable  
3 in some cases, but arbitrary if the fund were extremely large.”) (emphasis added).

4 **III. Counsel Have Yet to Supply Adequate Information for Calculation of a Lodestar  
5 Because They Have Yet to Provide the Court with Their Hourly Bills (although  
6 Counsel Have Offered to Do So)**

7 Unfortunately, as of this point, plaintiffs' counsel have yet to supply the Court with the  
8 required information to calculate a loadstar. Yet, what is required of counsel is not onerous; it is  
9 the same requirement any attorney faces – they need to present the Court (as proxy for their  
10 client) with their hourly bills. “The party petitioning for attorneys' fees 'bears the burden of  
11 submitting detailed time records justifying the hours claimed to have been expended.”” *In re*  
12 *Wash. Pub. Power*, 19 F.3d at 1305 (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205,  
13 1210 (9th Cir.1986)) (emphasis added). If the hours are not submitted, then the Court should  
14 require their submittal (or in the alternative, reduce the hours credited). *Wninger*, 301 F.3d at  
15 1125-26 (“Giving counsel the benefit of the doubt even in light of apparently improperly claimed  
16 hours, however, runs counter to the rule in *Chalmers* that the burden to submit *detailed* records  
17 justifying hours *reasonably* expended falls upon the claiming attorneys. The district court should  
18 have required greater specificity or reduced the hours further by those the firm had not proved to  
have been reasonably expended.”) (emphasis in original).

19 Here, giving counsel the benefit of the doubt, the matter can be addressed simply by  
20 requiring submission of counsel's hours. Indeed, *Santos* and *Torres* counsel have already  
21 indicated their willingness to supply such information.<sup>4</sup> (Docket No. 331 at 15-16). Similarly,  
22 *Simpao* counsel have indicated they are willing to submit such information as well (assuming  
23 they show any entitlement to recovery). (Docket No. 415 at ¶ 4; Docket No. 418 at ¶ 8).<sup>5</sup>

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25 <sup>4</sup> In all fairness, counsel for *Santos* and *Torres* could not have supplied their complete bills  
26 in June 2006 when they filed their initial motion for attorneys' fees and costs since work  
27 remained to be done at that time. But, they could have supplemented that filing with their up-to-  
date bills on June 8, 2007 under section II(c)(iv) of the Settlement Agreement.

28 <sup>5</sup> *Simpao* counsel have requested permission to submit their bills *in camera*. However,  
attorney bills are not ordinarily privileged. *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127,

1           Of course, in submitting the hours, counsel do have an obligation to remove any hours not  
2 attributable to the successful settlement of the case; otherwise, the Court can remove them.  
3           *Wininger*, 301 F.3d at 1125-26. However, hopefully in this case that would not be an issue.  
4 Instead, assuming only properly attributable hours are presented, the Court can then make the  
5 necessary decision on a lodestar factor, and whether a multiplier is appropriate.<sup>6</sup>

6           **IV. Even if a Percentage-of-Recovery Fee Is Awarded, the Lodestar Cross-Check Should  
7           Be Utilized to Meet the Requirement that Fees Be Shown to be Reasonable**

8           Although the “windfall” nature of the recovery sought here urges the direct application of  
9 the lodestar, if it is not utilized, then at minimum it should be used to “cross-check” the common  
10 fund recovery and ensure compliance with the Ninth Circuit’s mandate that any fee award be  
11 reasonable: “[T]he best practice is to assess a percentage fee award not only by using the usual  
12 litany of factors bearing on the reasonableness of a fee, *see, e.g., Vizcaino v. Microsoft Corp.*, 290  
13 F.3d 1043, 1047-50 (9th Cir.2002), **but also by cross-checking the percentage fee award  
14 against a rough fee computation under the lodestar method.”** *Young v. Polo Retail, LLC*,  
15 2007 WL 951821, \*5 (N.D. Cal. 2007) (emphasis added) (citing *Vizcaino*, 290 F.3d at 1050-51  
16 (approving district court’s use of a lodestar cross-check); *In re GMC Pick-Up Tuck Fuel Tank  
17 Prods. Liability Litig.*, 55 F.3d 768, 820-21 & n.40 (3d Cir. 1995); *In re HPL Techs, Inc., Sec  
18 Litig.*, 366 F Supp 2d 912 (N.D. Cal.2005)); *accord In re Coordinated Pretrial Proceedings*, 109  
19 F.3d at 607 (approving of comparison of lodestar with percentage to judge reasonableness of fee).

20           130 (9th Cir. 1992) (“We have examined the attorney billing statements ordered disclosed by the  
21 district court. We conclude that they do not contain privileged communications between attorney  
22 and client. The statements contain information on the identity of the client, the case name for  
23 which payment was made, the amount of the fee, and the general nature of the services  
24 performed. Our previous decisions have held that this type of information is not privileged.”)  
25 (emphasis added and citations omitted). To the degree any portions of the otherwise non-  
privileged bills are privileged, the proper procedure is to redact the publicly filed copy of any  
truly privileged matters, not to entirely deprive the class of any notice of the contents. This is  
especially important here, where so much of the *Simpao* plaintiffs’ counsel’s work has so plainly  
not generated any benefits for the class as discussed *infra*, and thus scrutiny is required to  
determine which work, if any, benefited the class.

26           <sup>6</sup> The lodestar amount is presumptively the reasonable fee amount, and a multiplier may  
27 be used to adjust the lodestar amount upward or downward only where supported by “specific  
28 evidence” on the record that the lodestar amount is unreasonably low or unreasonably high.  
*Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986)  
(citation omitted); *Cunningham v. County of Los Angeles*, 879 F.2d 481, 487 (9th Cir.1988).

1 A cross-check is not a difficult process. It simply requires “sworn declarations from the  
2 attorney(s) in charge of billing records for the case attesting to (1) the experience and  
3 qualifications of the attorneys who worked on the case; (2) those attorneys’ customary billing  
4 rates during the pendency of the case; and (3) the hours reasonably expended (reduced if  
5 necessary in the exercise of professional billing judgment) by those attorneys in prosecuting the  
6 case.” *Young*, 2007 WL 951821, at \*5. Indeed, notable in the *Young* case, application of the  
7 lodestar cross-check proved to more than justify the fees sought on a percentage-of-recovery  
8 basis, where before that cross-check the court was concerned the award was excessive. *Id.* at \*8  
9 (“This outcome also shows that relying on percentages without reference to these other factors  
10 can be, like blind reliance on benchmarks, an ‘all too tempting substitute for the searching  
11 assessment that should properly be performed.’”) (citation omitted).

12 Again, however, the plaintiffs' attorneys have yet to supply such information to the Court,  
13 thereby making it impossible for the Court to asses at this time how reasonable or unreasonable  
14 the requested fees are. Thus, even if the Court determines to apply the percentage-of-the-fund  
15 method, the Governor and Government urge that the Court require submission by counsel (as they  
16 have offered to do) of sufficient information to permit a lodestar "cross-check" such that the  
17 Court is assured that the amount of attorneys' fees and cost awarded is a reasonable award, and  
18 not merely the result of a mechanical process divorced from the realities of the litigation. *Fischel*,  
19 307 F.3d at 1007; *see also* Guam R. Prof. Cond. at 1.5(a)(1) (first factor to be considered when  
20 determining the reasonableness of a fee is "the time and labor required.").

21      **V.    *Simpao* Plaintiffs' Counsel Should Not Recover Fees or Costs Because They Have**  
22      **Accomplished Little to Nothing for the Class**

23 The forgoing discussion has not separately considered the application by *Simpao* counsel.  
24 But, putting aside all other issues, the request for fees and costs by the *Simpao* plaintiffs' counsel  
25 should be denied even without calculation of a lodestar.

26       Simpao plaintiffs' counsel did not join the settlement; they are objectors who opposed the  
27 settlement. Now, however, having arrived in this litigation only after the first settlement, having  
28 failed in their effort to intervene in *Santos*, having failed to achieve any results not accomplished

1 by the settlement, having delayed implementation of the settlement though their objections (and  
2 thus delayed the EIC Class members' receipt of money under the settlement), *Simpao* plaintiffs'  
3 counsel seeks \$4.5 million dollars from the settlement. This is exceedingly unreasonable.

4 If counsel for an objector is to be permitted to recover from a settlement, such a recovery  
5 must be limited solely to the time spent on tasks that actually benefited the class. *E.g. Wininger*  
6 *v. SI Management, L.P.*, 301 F.3d 1115, 1125 (9th Cir. 2002) (affirming district court's exclusion  
7 from lodestar calculation all time spent by objectors' counsel "in unsuccessful efforts unrelated to  
8 their success challenging Plaintiffs' counsels' fee request"); *In re Veritas Software Corp.*  
9 *Securities Litig.*, 2006 WL 463509 at \*5 (N.D. Cal. 2006) (excluding from lodestar for objector's  
10 fees all time except that spent on single objection that actually benefited the class).

11 Here, it is questionable if anything the *Simpao* plaintiffs' counsel did benefited the EIC  
12 Class. The *Simpao* plaintiffs continue to take credit for the partial summary judgment Order.  
13 Yet, this Court has held that what little was achieved by the Order was in part the results of the  
14 Attorney General's unauthorized concession of issues. (*Simpao* Docket No. 148 at 3 ("Based in  
15 part on the Attorney General's concession on the issue, the Court granted the plaintiffs summary  
16 judgment on the issue of whether EIC applies to Guam.")). Indeed, the *Simpao* plaintiffs'  
17 "achievement" of a holding that the EIC applied to Guam had no discernable benefit to the EIC  
18 Class – before that Order issued, the Governor had already signed a term sheet for the initial \$90  
19 million settlement that (with some modifications and joinder of the *Torres* plaintiff) now  
20 underlies the final settlement before the Court. (*See Simpao* Docket No. 96). Thus, by the time  
21 the Order was rendered, the issue was already resolved in the EIC Class' favor (assuming they  
22 wished to be members of the settlement, which they have in overwhelming numbers).

23 *Simpao* plaintiffs' counsel also claim credit for the Executive Order and EIC forms issued  
24 by the Governor to start accepting EIC claims (the "EIC-GU forms"). (*See* Docket No. 414 at 6).  
25 This is rather ironic since the *Simpao* plaintiffs' counsel actually spent their time and money  
26 challenging those procedures and forms and moving unsuccessfully for a partial summary  
27 judgment order requiring alternative procedures they sought; it was this Court that upheld the  
28

1 Government's arguments and approved the Governor's Executive Order and forms over *Simpao*  
2 plaintiffs' counsel's objections. (See *Simpao* Docket No. 99 at 9-12).

3 And, there is no evidence that the Executive Order and forms that the *Simpao* plaintiffs  
4 tried to defeat were a response to the *Simpao* litigation. The Governor issued them consistent  
5 with his campaign promises to implement the EIC. And *Santos* and *Torres* counsel, having filed  
6 suit first, have much better claims than the Executive Order and forms responded to their suits.

7 The fact is that an evaluation of what *Simpao* counsel state they spent their time on shows  
8 virtually nothing of any value to the EIC Class. Specifically, on paragraph 3 of the Canto  
9 Declaration (Docket No. 415) and paragraph 7 of the Stephens Declaration (Docket No. 418),  
10 *Simpao* counsel list in bullet point fashion what they spent their thousands of hours  
11 accomplishing. Going through those same bullet points, it is quite clear that these thousands of  
12 hours have minimal to no benefit for the EIC Class that joined this settlement:

13 • *Simpao* counsel cite their motion to intervene in *Santos*. That motion was  
14 denied and thus of no benefit to the EIC Class. (Docket No. 76).

15 • *Simpao* counsel cite their filing of a separate action. By the time it was  
16 filed in December 2004, it was the third, duplicative action to be brought (after *Santos*  
17 and *Torres*) and thus of no benefit on its own to the EIC Class unless it achieved  
18 something (which, as discussed, it did not).

19 • *Simpao* counsel cite their defense of the motion to dismiss and the partial  
20 summary judgment motion. By the time these occurred, the same results already were  
21 contained in the first *Santos* settlement and, as to the partial summary judgment, the  
22 second *Santos* settlement's terms sheet. It is hard to see how this duplicative work  
23 benefited the EIC Class.

24 • *Simpao* counsel cite their filing of a motion for class certification. That  
25 motion was never heard, was recognized by this Court to be a *danger* to the \$90 million  
26 settlement from which *Simpao* counsel now seek to benefit (see *Simpao* Docket No. 148  
27 at 7), and now will be moot if the settlement is approved since there have been to few  
28 opt-outs to justify certification of a second class.<sup>7</sup> Therefore, this motion too did not  
benefit the EIC Class.

• *Simpao* counsel cite their briefing on the motion for preliminary approval  
of the settlement. The sole achievement of that briefing (which sought to scuttle the  
settlement in its entirety) was to slightly narrow the class definition to exclude those

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27 <sup>7</sup> Indeed, only one of the three *Simpao* plaintiffs opted out of the settlement, meaning that  
28 the other two have joined this case as class members (assuming approval of the settlement) and  
therefore mooting out the *Simpao* class certification motion.

1 members of the working poor who had yet to file timely tax returns. (See Docket No.  
2 384). At most, this was of minimal value to the EIC Class, and cannot have required all  
3 that many hours work.  
4

5 • *Simpao* counsel cite their “interviews of fact witnesses.” The Governor is  
6 unaware of when those interviews have ever been of any benefit in this litigation to the  
7 EIC Class – as far as the record reveals, there is nothing in the dockets of any of the cases  
8 even mentioning any interviews, much less showing their value to the EIC Class.

9 • *Simpao* counsel cite their retention of experts. The only time of which the  
10 Governor is aware that such expert testimony was ever utilized was when *Simpao* counsel  
11 cited a calculation of interest as Exhibit C to Docket No. 346 in opposing preliminary  
12 approval of the settlement on the ground that interest should be included in the settlement  
13 amount. Notably, the Court granted preliminary approval without accepting this  
14 argument, so this too did not benefit the EIC Class.

15 • *Simpao* counsel cite their legal research efforts, but that simply begs the  
16 question of whether such research translated into results that benefited the EIC Class.  
17

18 • *Simpao* counsel cite their “analyzing and formulating a strategy to meet the  
19 Government of Guam’s challenges,” but it is not clear at all when that (whatever it is)  
20 benefited the EIC Class.  
21

22 • *Simpao* counsel cite their “gathering of evidence,” but as with the  
23 interviews, it is unclear if this information was ever used, much less used to benefit the  
24 EIC Class.  
25

26 • *Simpao* counsel cite their participation in hearings, but again this begs the  
27 question of how the results of those hearing benefited the EIC Class.  
28

29 • *Simpao* counsel cite their participation in settlement negotiations; yet, they  
30 plainly did not join the settlement, and so this participation did not benefit the EIC Class  
31 (which has chosen to accept the settlement).  
32

33 • *Simpao* counsel cite winning “two motions,” an apparent effort to yet again  
34 cite the motion to dismiss and partial summary judgment motions discussed above (and  
35 notably, the partial summary judgment was also not at all a clean “win,” as discussed).  
36

37 • *Simpao* counsel cite “communications” with the Government regarding the  
38 availability of funds to pay the EIC. Again, the benefit of this to the EIC Class is not  
39 addressed.  
40

41 • *Simpao* counsel cite the assembly of research and evidence for “an eventual  
42 trial,” but this is of no benefit to the class, which has settled and to avoid the risk of trial.  
43

44 In sum, this long litany of work provides no justification for the fees sought because there is no  
45 showing of how this benefited the EIC Class’ recovery.  
46

47 Further, it bears mentioning that the hourly rate sought by *Simpao*’s off-island counsel of  
48 up to \$750 per hour are scandalous. First, their fees ought to be governed by what is reasonable  
49 in Guam, not what they might charge in Seattle. *See Young*, 2007 WL 951821, at \*7-8 (utilizing  
50

1 market rates in San Francisco to determine proper rates for San Francisco case). Second, the rates  
2 suggested even for Seattle have to be substantially above that market's average; consider that in  
3 *Young*, the court concluded that in San Francisco (which is probably a more expensive market  
4 than Seattle) as of March 28, 2007 the average fees were substantially lower. *Id.* at \*8 (setting  
5 out attorney rates of \$200-\$425 an hour, depending on experience). Thus, while in the view of  
6 the Government and Governor, no grounds for fees and costs being awarded to *Simpao* counsel  
7 has been given, if any amount is awarded, it should be based on actual hours spent benefiting the  
8 EIC Class, at the commercially reasonable rates presently existing in Guam.

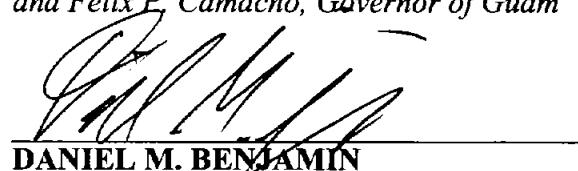
9 **CONCLUSION**

10 Consistent with their duties to the people and taxpayers of Guam, including the recipients  
11 of the EIC settlement, the Governor and Government of Guam respectfully ask that before this  
12 Court awards any attorneys' fees and costs, it exercise its authority to safeguard the interests of  
13 the EIC Class by applying a lodestar analysis or, alternatively, otherwise obtaining sufficient  
14 information regarding the hours reasonably expended by counsel to ensure that the EIC Class is  
15 not subject to an undue or unconscionable deduction of costs and fees.

16 Dated this 22nd day of June, 2007.

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OFFICE OF THE GOVERNOR OF GUAM  
CALVO & CLARK, LLP  
Attorneys at Law  
*Attorneys for the Government of Guam  
and Felix P. Camacho, Governor of Guam*

By:



DANIEL M. BENJAMIN